STATE OF MICHIGAN

COURT OF APPEALS

ASSOCIATION OF DETROIT SUPERVISORS, Petitioner-Appellant,	UNPUBLISHED January 10, 2003
v	No. 233935 MERC
CITY OF DETROIT and DEPARTMENT OF PUBLIC WORKS, Respondent-Appellee.	LC Nos. 99-000030 99-000100

Before: Bandstra, P.J., and Zahra and Meter, JJ.

PER CURIAM.

Petitioner appeals as of right from an order of the Michigan Employment Relations Commission (MERC) dismissing its unit clarification petition. We affirm.

Petitioner sought to add a City of Detroit Department of Public Works' (DPW) junior training specialist position, held by DPW employee Willie Riley, to its supervisory bargaining unit. Petitioner argued that because Riley performed the same duties before his promotion to junior training specialist (when he was a member of petitioner's bargaining unit as a foreman) his position should remain within petitioner's bargaining unit following his promotion.

The MERC ultimately concluded that Riley's duties as DPW junior training specialist lacked the indicia of authority generally attributed a supervisor by the MERC and, therefore, dismissed the petition. Petitioner sought reconsideration of the commission's decision, arguing that the MERC was obligated to accept the parties' stipulation regarding the supervisory nature of the position. In the alternative, petitioner asked that the record be reopened so that additional evidence on that issue could be adduced. The MERC declined to reopen the proofs, concluding that, irrespective of the supervisory nature of the position at issue, as part of an unrepresented city-wide series that had been in existence for a number of years, it would be inappropriate to include the junior specialist training position in petitioner's bargaining unit. This appeal followed.

Petitioner claims that the MERC erred in concluding that, regardless of the supervisory status of the DPW junior training specialist position, the position should be excluded from petitioner's bargaining unit. Appellate review of a decision by the MERC is limited. *Organization of School Administrators and Supervisors v Detroit Bd of Ed*, 229 Mich App 54, 64; 580 NW2d 905 (1998). Factual findings of the MERC are conclusive if they are supported

by competent, material, and substantial evidence upon an examination of the entire record. *Id*.; MCL 423.216(e); Const 1963, art 6, § 28. Similarly, we will set aside a legal ruling of the MERC only if it is affected by a substantial and material error of law. *Grandville Municipal Executive Ass'n v City of Grandville*, 453 Mich 428, 436; 553 NW2d 917 (1996).

Determination of an appropriate bargaining unit is a finding of fact, not to be overturned by an appellate court if it is supported by competent, material and substantial evidence. *Michigan Ed Ass'n v Alpena Community College*, 457 Mich 300, 307; 577 NW2d 457 (1998). Although the touchstone of an appropriate bargaining unit is a finding that all its members have sufficient common interest in the terms and conditions of employment to warrant their inclusion in a single unit and the choosing of a bargaining agent, *Muskegon County Professional Command Ass'n v Muskegon Co*, 186 Mich App 365, 373; 464 NW2d 908 (1990), the "MERC has had a consistent policy of using the unit clarification petition to determine appropriateness only for newly created positions, or in situations where job duties have been substantially altered," *Charter Twp of Blackman v Police Officers Ass'n of Michigan*, 1988 Mich Lab Op 419; 1 MPER ¶ 19094 (1988). Further, the commission has

> consistently held that where an employee or group of employees have been historically excluded from an established unit, a question of representation is raised which cannot be resolved through the mechanism of a unit clarification petition, even if the excluded groups share a community of interest with an existing unit; therefore, a union seeking to add these groups to its unit must file a representation election petition. [*Id*. at 423.]

Evidence presented at the MERC hearing indicates that the training specialist series, of which the position at issue is a part, originated with the creation of a single "training officer" position in 1978, and was introduced into the DPW with the addition of a training specialist position in 1992. Evidence that the DPW employee who held this position until shortly before Riley took over had not been a member of petitioner's bargaining unit was also presented, and the city's job descriptions for the training specialist series, which were submitted as exhibits at the MERC hearing, indicate that the positions were adopted in 1993, six years before petitioner filed its petition. A training specialist who has worked within the training specialist series in another city department for the last fifteen years also testified that he has never been included in a union bargaining unit.

In light of this record evidence, we find no basis to conclude that the MERC improperly determined that, on the basis of the series' history of being excluded from a bargaining unit, the DPW junior training specialist should be excluded from petitioner's bargaining unit even if that position is supervisory. The MERC's decision to exclude the DPW junior training specialist position from petitioner's bargaining unit is supported by competent, material and substantial evidence, and we will not set aside those findings merely because alternative findings also could have been supported by substantial evidence on the record, *In re Payne*, 444 Mich 679, 692; 514

NW2d 121 (1994), or we might have reached a different result, *Arndt v Dep't of Licensing & Regulation*, 147 Mich App 97, 101; 383 NW2d 136 (1985).[1]

We affirm.

/s/ Richard A. Bandstra
/s/ Brian K. Zahra
/s/ Patrick M. Meter

[1] Because we conclude that the MERC properly dismissed petitioner's petition on these grounds, we need not address petitioner's arguments concerning the propriety of the MERC's findings regarding the supervisory nature of the junior training specialist position, or its decision not to reopen the record for additional evidence on that issue.